STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD CHARLES DISNEY,

Defendant-Appellant.

UNPUBLISHED
January 17, 2008

No. 273367
Wayne Circuit Court
LC No. 06-005628-01-FC

Before: Talbot, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating under the influence, MCL 257.625(1)(a), (9)(c)(*i*)[1], and possession of a controlled substance, MCL 333.7403(2)(b)(*ii*). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to five to 15 years on each count. We affirm defendant's convictions and sentences but remand solely for clerical correction to the judgment of sentence.

Defendant first challenges the trial court's upward departure from the sentencing guidelines of 14 months above the guidelines minimum range. Contrary to the prosecution's erroneous citation to case law involving the judicial sentencing guidelines to support the contention that the statutory guidelines do not apply to habitual offender sentences, *People v Cervantes*, 448 Mich 620, 630; 532 NW2d 831 (1995), the legislative guidelines clearly indicate that defendant's status as a habitual offender increases the upper limit of the minimum range under the statutory guidelines by a specified percentage. MCL 777.21.

However, a trial court may depart from the statutory sentencing guidelines only if it has a substantial and compelling reason for the particular departure and states that reason on the record. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 437 n 10, 439; 636 NW2d 127 (2001). The sentence should be proportionate to the seriousness of the crime and the defendant's criminal history. *People v Babcock*, 469 Mich 247, 262-264; 666 NW2d 231 (2003).

[1] Based on defendant's two prior convictions for operating while intoxicated or under the presence of a controlled substance, MCL 257.625(1)(a) was elevated to a felony in accordance with MCL 257.625(9)(c)(*i*).

In support of its departure, the trial court cited defendant's extensive criminal record, which included 14 prior felonies. Defendant's numerous prior felony convictions constituted objective and verifiable facts on which the court could justify a guidelines departure. See *People v Abramski*, 257 Mich App 71, 74-75; 665 NW2d 501 (2003). We note that defendant would have received the same total prior record variables score with significantly fewer felony convictions. Although a departure cannot be based on an offense or offender characteristic that is already taken into account in the sentencing guidelines, it was reasonable for the trial court to find that the variables did not adequately address defendant's extensive criminal history and his demonstrated lack of rehabilitative potential. MCL 769.34(3)(b). Therefore, the trial court's reference to defendant's prolonged history with the criminal justice system constituted a substantial and compelling reason supporting a departure from the sentencing guidelines.

Defendant, filing a Standard 4 brief, argues that he was denied the effective assistance of counsel because his attorney failed to request an expert to testify regarding the inherent unreliability of eyewitness testimony. When a party fails to move for a new trial or request an evidentiary hearing, review is limited to any mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We reverse a lower court on the basis of ineffective assistance of counsel only when counsel's performance fell below an objective level of reasonableness and the party was denied a fair trial as a result. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The decision to obtain expert testimony regarding witness reliability is generally presumed to fall within the realm of trial strategy. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (2000). Given the identification of defendant by a witness involved in the accident coupled with his arrest at the scene while in the driver's seat of the vehicle, it is nonsensical to suggest that identification was an actual issue for dispute, let alone necessitating the testimony of an expert.

Defendant is also mistaken when he claims on appeal that he would likely have received funds for the expert. As noted *supra*, it was extremely unlikely that defendant could successfully demonstrate "a nexus between the facts of the case and the need for an expert." See *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995). There was no doubt regarding defendant's identity. The only potential issue was whether defendant was the driver or passenger. The state trooper testified that defendant was in the driver's seat trying to start the engine when he approached the car and that defendant admitted at the scene that he was driving the vehicle. In addition, there was no evidence contradicting the eyewitness's claim that defendant was driving when the accident occurred. Because it was not reasonably probable that the outcome would have changed if defense counsel had requested an expert in eyewitness testimony, defendant was not denied the effective assistance of counsel. See *Toma*, *supra* at 302.

Defendant also argues that the trial court should have instructed the jury that defendant did not illegally possess a controlled substance if he had a prescription. We must determine whether the trial court's description of the elements fairly presented the issues and adequately protected defendant's rights. *People v Osantowski*, 274 Mich App 593, 611-612; 736 NW2d 289 (2007). The court instructed the jury that the prosecutor must prove defendant was not authorized to possess the controlled substance. Defendant was convicted pursuant to MCL 333.7403, which prohibits persons from knowingly or intentionally possessing controlled substances unless it was "obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as

otherwise authorized by this article." Defendant possessed a prescription bottle in another person's name and offered no evidence that this was a valid prescription and he was merely transporting it on the owner's behalf. Contrary to defendant's assertion, the trial court's instructions fairly presented the issues and adequately protected defendant's rights. See *Osantowski, supra* at 611-612.

Finally, defendant argues that there was insufficient evidence that defendant possessed the drug without a prescription, was already intoxicated when he drove, and was the only person who could have committed the crime. A reasonable trier of fact could find each element of the crime beyond a reasonable doubt, viewing the evidence in the light most favorable to the prosecution. See *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). The prescription was not in defendant's name, and he offered no evidence that he had a valid reason to possess it. Defendant's conduct after the accident, sobriety tests, and blood test constituted evidence of his likely condition while driving. Testimony by the eyewitness that defendant was swerving just before the collision occurred constituted further evidence that defendant was already intoxicated and unable to drive normally immediately before the accident. Defendant does not cite any authority to support his contention that the prosecution must eliminate any possibility that the female passenger was not the driver of the vehicle. Notably, defendant fails to provide any evidence to suggest that the female was actually the driver at the time of the accident other than to assert that her mere presence in the vehicle allows for the possibility that someone other than defendant was driving. Given the testimony of the eyewitness that defendant was driving and the state trooper's finding of defendant, minutes after the accident occurred, in the driver's seat trying to start the car, sufficient evidence existed to support defendant's convictions of the charged offenses.

We note that the judgment of sentence, having already been amended once following written communication from the Michigan Department of Corrections (MDOC), correctly identifies defendant's conviction as OWI, third offense, but erroneously indicates the relevant statutory citation as MCL 257.625(6)(d), which is nonexistent. Consequently, we remand solely for the ministerial purpose of correcting the judgment of sentence to reflect defendant's conviction pursuant to MCL 257.625(1) and (9)(c). MCR 6.435(A); MCR 7.216(A)(7).

Affirmed.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Patrick M. Meter